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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-862

WILLIAM HENRY INGRAM,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE GEORGIA SUPREME COURT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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ON PETITION FOR WRIT OF CERTIORARI TO THE GEORGIA SUPREME COURT

BRIEF FOR THE RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1.

Was the superior court correct when it charged concerning conspiracy?

2.

Did the superior court abuse its discretion in denying Petitioner's motion to sever?

3.

Was the superior court correct when it held that the state had proved by the preponderance of the evidence that Petitioner's confession was knowing and voluntary?

4.

Did the judge of the superior court maintain his proper role during the trial?

5.

Was there reversible error when the trial judge, sitting without a jury, admitted hearsay evidence during the sentencing phase of Petitioner's trial?

6.

Was reversible error committed when the district attorney commented on the failure of Petitioner's attorney to make an opening statement?

STATEMENT OF THE CASE

Petitioner and two other defendants, Bradley and Riggins, were tried jointly for murder, armed robbery, and aggravated assault. Bradley was convicted of armed robbery and aggravated assault; Riggins and Petitioner were convicted of aggravated assault. The trial judge sentenced Petitioner and Riggins to ten years imprisonment.

Petitioner appealed his conviction to the Georgia Court of Appeals, and his conviction was affirmed. *See Ingram v. State*, 134 Ga. App. 935, 216 S.E. 2d 608 (1975). His motion for rehearing was denied, and Petitioner applied for certiorari in the Georgia Supreme Court. The Georgia Supreme Court denied the writ of certiorari *See Ingram v. State*, No. 30227, decided Sept. 17, 1975.

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REASONS FOR NOT GRANTING THE WRIT

A. THE PETITION FOR THE WRIT OF CERTIORARI IS NOT OF SUCH AN EXTRAORDINARY NATURE THAT IT REQUIRES THIS COURT TO ISSUE SUCH A WRIT.

"A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and controlling reasons therefor." Rule 19, Revised Rules of the Supreme Court of the United States (1970). This Court generally grants certiorari from a state court decision under the following circumstances: (1) if the state court has decided a federal question of substance not previously determined by this Court or (2) if the state court has decided a case in a way not in accord with applicable decisions of this Court. *See* Rule 19, Revised Rules of the Supreme Court of the United States (1970).

Petitioner's questions for review present no substantial federal question not previously determined by this Court, and the state court decision is fully in accord with applicable decisions of this Court. The Georgia Court of Appeals considered Petitioner's six enumerations in the direct appeal, and the Georgia Supreme Court saw such little merit in these enumerations that the court denied certiorari.

B. THE TRIAL COURT WAS CORRECT WHEN IT CHARGED THE JURY CONCERNING CONSPIRACY.

Under Georgia law conspiracy is a separate crime only in cases where the crime conspired to be committed had not in fact been committed. *Scott v. State*, 229 Ga. 541, 544, 192 S.E. 2d 367 (1972). Ga. Code Ann. § 26-801 (a) provides that every person concerned in

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the commission of a crime is a party thereto and may be charged and convicted of the commission of the crime. A person is concerned in the commission of a crime if he intentionally aids and abets in the commission of the crime. Ga. Code Ann. § 26-801 (b). While this code section does not use the word conspiracy, it is plain that it embodies the theory of conspiracy insofar as it renders one not directly involved in the crime responsible as a party. Ga. Code Ann. § 26-802; *Scott v. State* at 544.

The evidence in this case showed that Petitioner accompanied four other males to the residence of the two victims. One of the males pulled out a pistol, ordered the two victims to lie on the floor, and began beating them with the pistol. Another of the males hit one of the victims over the head with a wine bottle. One of the victims later died as a result of the beating. The robbers took stereo equipment and other personal effects belonging to the victims, and the robbers left in Petitioner's car. Petitioner admitted to police that he was present during the assault and the robbery and that he helped dispose of some of the stolen goods.

Under the evidence in this case, the charge against Petitioner was based on the theory that Petitioner had conspired with the other males to commit the crime and that Petitioner had aided and abetted in its commission. *See United States v. Heinlein*, 490 F. 2d 725 (D.C. Cir. 1973). Petitioner was charged with murder, armed robbery, and aggravated assault; he was convicted of aggravated assault, not conspiracy. The State's theory of the case was that Petitioner was guilty of aggravated assault because he conspired, aided, and abetted in the commission of the crime.

Therefore, the trial court properly charged concerning conspiracy.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING PETITIONER'S MOTION TO SEVER.

It was within the sound discretion of the trial judge as to whether the defendants should be tried together or severally, and there is nothing in the record to indicate an abuse of such discretion. *See Opper v. United States*, 348 U.S. 84, 95 (1954). In Georgia, if two or more defendants are jointly indicted for a capital offense, they shall be tried separately unless the state waives the death penalty. "[W]hen the death penalty is waived . . . defendants may be tried jointly or severally in the discretion of the trial court." Ga. Code Ann. § 27-2101.

The only prejudice Petitioner asserts is that during the trial he had to sit at the same table with the other two defendants. Petitioner had no antagonistic defense, and the trial court did not abuse its discretion in denying Petitioner's motion to sever. *See United States v. James*, 494 F. 2d 1007, 1012 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1020 (1975); *United States v. Heinlein*, 490 F. 2d 725, 737 (D.C. Cir. 1973); *United States v. Clark*, 480 F. 2d 1249, 1252-53 (5th Cir. 1973), *cert. denied*, 414 U.S. 978 (1973).

D. THE TRIAL COURT PROPERLY ADMITTED PETITIONER'S CONFESSION INTO EVIDENCE.

Before admitting Petitioner's confession into evidence, the trial court held a hearing outside the presence of the jury to determine voluntariness. *See Jack-*

son v. Denno, 378 U.S. 368 (1964). In a *Jackson v. Denno* hearing, the voluntariness of a confession must only be established by the preponderence of the evidence. *Lego v. Twomey*, 404 U.S. 477 (1972).

Before Petitioner was arrested, deprived of his freedom in any way, or was even a suspect, he told police he knew something about the crime. In such a situation, the *Miranda* warnings are not required. *See United States v. Wiggins*, 509 F. 2d 454 (5th Cir. 1975).

As soon as Petitioner admitted he knew something about the crime, law enforcement officers warned Petitioner of his right to remain silent, that anything he said could be used against him, his right to presence of retained counsel, and his right to the presence of appointed counsel if Petitioner were indigent. He was not warned that he could stop the interrogation at any time. *Miranda* does not require this warning. If the suspect "indicates in any manner and at any stage of this process that he wishes to consult with an attorney before speaking there can be no more questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him." *Miranda v. Arizona*, 384 U.S. 436, 444-445 (1966). *Miranda* requires that the questioning cease if the suspect so desires or if the suspect wishes to see an attorney. The verbal warnings must be that the suspect has the right to remain silent, anything he says may be used against him, the right to retained counsel, and the right to appointed counsel if the suspect is indigent. *Miranda* at 444, 472-73.

The trial court properly admitted Petitioner's confession into evidence, and Petitioner's enumeration of error is without merit.

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E. THE TRIAL JUDGE MAINTAINED HIS PROPER ROLE DURING PETITIONER'S TRIAL.

Petitioner alleges that by taking an active role in this case, the trial judge abandoned his role of impartiality. However, *Quercia v. United States*, 289 U.S. 466 (1933) does not condemn an active role by a trial judge. The trial judge in *Quercia* indicated in his instructions to the jury that the accused was probably lying. The Georgia Court of Appeals carefully examined the Petitioner's trial transcript and held that the trial judge did not leave his position of impartiality to the extent that an unfair trial resulted.

The trial judge did not indicate his opinion of the case to the jury, and Petitioner received a fair trial. *E.g.*, *United States v. Carlos*, 478 F. 2d 377 (9th Cir. 1973); *United States v. Stone*, 431 F. 2d 1286, 1290-91 (5th Cir. 1970), *cert. denied*, 401 U.S. 912 (1971).

F. NO REVERSIBLE ERROR OCCURRED WHEN THE TRIAL JUDGE ADMITTED HEARSAY EVIDENCE AT PETITIONER'S SENTENCING HEARING.

In Georgia after an accused has been found guilty of a felony, the jury is dismissed, and the judge imposes the sentence. Ga. Code Ann. § 27-2502. At Petitioner's sentencing hearing, the jury had been dismissed. Where a court is sitting without a jury, the presumption is that the trial court considered only the competent evidence and disregarded all evidence that was incompetent. *Altom v. United States*, 454 F. 2d 289, 296 (7th Cir. 1971), *cert. denied*, 406 U.S. 917 (1972); *Thompson v. Baltimore & Ohio R.R.*, 155 F. 2d 767, 769 (8th Cir. 1946), *cert. denied*, 329 U.S. 962 (1946); *Bailey*

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v. Sears, Roebuck & Co., 115 F. 2d 904, 907 (9th Cir. 1940), *cert. denied*, 314 U.S. 616 (1941); *Hedrick v. Perry*, 102 F. 2d 802, 808 (10th Cir. 1939); *e.g. Hale v. United States*, 406 F. 2d 476, 480 (10th Cir. 1969), *cert. denied*, 395 U.S. 977 (1969).

The jury had found Petitioner guilty of aggravated assault, and the judge conducted the sentencing hearing without a jury. The judge imposed a sentence within the statutory limits, *see* Ga. Code Ann. § 26-1302; and Petitioner's enumeration of error is without merit.

G. NO REVERSIBLE ERROR WAS COMMITTED BY THE DISTRICT ATTORNEY'S COMMENTING CONCERNING THE FAILURE OF PETITIONER'S COUNSEL TO MAKE AN OPENING STATEMENT.

In his closing argument to the jury, the district attorney commented on Petitioner's counsel's failure to make an opening statement. The district attorney stated that Petitioner's attorney was afraid to reveal his theory of the case. *Griffin v. California*, 380 U.S. 609 (1965) proscribes the prosecution's comment on the accused's failure to testify. *Griffin* is not applicable to comment on the defense counsel's failure to make an opening statement.

No reversible error was commited in the district attorney's closing argument, and Petitioner's enumeration of error is without merit.

CONCLUSION

This Court should refuse to grant a writ of certiorari because no sufficient reasons for review have been set forth by Petitioner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, G. THOMAS DAVIS, Attorney of Record for the respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of the foregoing Brief for Respondent in Opposition upon the petitioner by depositing a copy of same in the United States mail, with proper address and adequate postage thereon to:

Vincent P. McCauley
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P. O. Box 1884
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This 16th day of January, 1976.

/s/ G. THOMAS DAVIS

G. THOMAS DAVIS